314 US 617

(24)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

NO. 194

GEORGE FREDERICK GUNDELFINGER, Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of GEORGE FREDERICK GUNDELFINGER respectfully represents:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your petitioner requests this court to review the judgment of the Circuit Court of Appeals of the Third Circuit in the above case. The judgment was entered on May 21, 1941 (Record 228).

The Circuit Court of Appeals affirmed the judgment and sentence imposed upon the petitioner by District Judge Nelson McVicar for the District Court for the Western District of Pennsylvania (R. 205-206).

NOTE: References are to pages of typewritten transcript of record, and will be carried in side folio references in record to be printed by the clerk.

The petitioner and defendant, George Frederick Gundelfinger, was indicted for sending through the mails three different documents: a pamphlet entitled "Yale's New Fraternity vs. Roman Catholic Fascism" (Ex. 1, R. 174); a circular entitled "The Gundelfinger Career" and "The Gundelfinger Mind" (Ex. 6, R. 175); and a letter (Ex. 7, R. 176).

Counts 1, 3, 5, 9 and 13 charged that the pamphlet, Ex. 1, was "obscene, lewd and lascivious", and was mailed to three members of the ~~fraternity~~ of Yale University and two attorneys in the service of the United States government in Washington. Counts 2, 4, 6, 10 and 14 (R. 5, 9, 13, 21, 29) charged that the pamphlet was "filthy", and was sent to the same persons.

Count 15 (R. 31) charged that the circular (Ex. 6, R. 175) was "obscene, lewd and lascivious", and was mailed to Franklin C. Salsbury, an attorney for the Federal Communication Commission in Washington (R. 31, 71). Count 16 (R. 33) charged that this circular was "filthy" and was mailed to Mr. Salsbury. Counts 17 (R. 35), 19 (R. 39) and 21 (R. 43) charged that the letter (Ex. 7, R. 176) was "obscene, lewd and lascivious" and was mailed to three members of the Yale football squad. Counts 18 (R. 37), 20 (R. 41) and 22 (R. 45), charged that the letter was "filthy" and was mailed to the same persons.

At the trial counts 7, 8, ~~13~~ and ~~14~~ were *nolle prossed* (R. 66, 67), and the trial judge directed a verdict for the defendant on count 15 (R. 146, 150).

At the trial the defendant voluntarily admitted the mailing of the exhibits to the parties above named (R. 103, 107), but denied that they were "obscene, lewd and lascivious, or filthy".

The defendant resides in Edgeworth, a suburb of Pittsburgh, Pennsylvania. At the time of the trial on May 29, 1940, he was 56 years of age (R. 11).

The defendant graduated from the Sheffield School, the scientific department of Yale University, in 1906 (R. 111). He continued in graduate work and received the degree of philosophy from Yale in 1909. He was a teacher in the Sheffield School from 1908 to 1913, and also taught in the graduate school (R. 111-112). He resigned voluntarily from the faculty in 1913 and returned to his home to write and publish his writings (R. 132-133). From 1909 to 1913, while teaching at Yale, he lived in a fraternity house as a proctor assigned to keep oversight over the conduct of the students in the house (R. 112). While serving as a teacher and proctor, he observed the habits and conduct of students and objected to immorality and drunkenness among them (R. 112-113).

Since he resigned from the faculty, the defendant has been publishing a small pamphlet or magazine entitled "Yale's New Fraternity", and in it his writings have been devoted largely to the purpose of lessening immorality among students (R. 113). This pamphlet has been published without charge or profit and at his own expense (R. 114).

The indictment charged the mailing of one issue only of the pamphlet or magazine (Ex. 1, R. 174). The circular (Ex. 6, R. 175) reprinted two articles from the "Yale News" with the defendant's reply to the same. The first article "The Gundelfinger Career" ridiculed his efforts and the second article "The Gundelfinger Mind" deliberately and openly attempted to make a psychoanalysis of Gundelfinger's mind, quoting from a treatise on "abnormal psychology" and pointing out the simi-

larity between "The Gundelfinger Mind" and an abnormal mental type known as a "schizoprenoid".

Defendant's motion to continue the case, on account of prejudicial remarks of counsel for the government in addressing the jury, was refused (R. 135-140; 162, 172).

The jury rendered a verdict of not guilty on Counts 7, 8, 11 and 12, which had been *nolle prossed* and on Count 15, on which the court gave a binding instruction, and a verdict of guilty on all other counts (R. 200).

Defendant's motions in arrest of judgment (R. 180) and for a new trial (R. 182) were refused by the trial judge (R. 202, 204). On January 31, 1941, the trial judge imposed sentence on the defendant, committing him to the custody of the attorney general for imprisonment in a penitentiary or a special institution for mental treatment for the period of one year and one day (R. 205).

The Circuit Court of Appeals affirmed the decision of the district court. No opinion was filed by the District Judge or by the Circuit Court of Appeals. The District Judge's interpretation of the Act is contained in his charge (R. 142-151; 153-156).

On a previous trial under an indictment for mailing the same pamphlet, Exhibit 1, and circular, Exhibit 6, counsel filing the present petition was appointed by the court to act as attorney for the defendant. Defendant conducted his own defense and made the argument to the jury. A motion in arrest of judgment, filed by counsel, was granted on the ground that each count of the indictment charged two separate defenses: (1) that the documents were obscene, lewd and lascivious; and

(2) that they were filthy. The opinion is not officially reported. In the trial under the present indictment the defendant argued his case to the jury.

II. JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 21, 1941 (R. 228). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III. QUESTIONS PRESENTED.

1. Is the language in the pamphlet, Exhibit "1", the circular, Exhibit "6" and the letter, Exhibit "7", "obscene, lewd and lascivious" within the Act of Congress (18 U. S. C. A., Sec. 344), prohibiting sending such matter through the mails?

2. Is the language of the same exhibits "filthy" within the Act?

3. Are publications on sex instruction within the prohibition of the Act?

4. Does this last question depend upon whether the views of the author are sound or accepted by medical and scientific authorities? If so, may the government secure conviction without offering proof of such unsoundness?

5. Did the trial judge err in refusing to continue the case because of improper remarks of the prosecuting attorney in addressing the jury?

IV. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1)—The decisions of the lower courts below that the publications of petitioner were "obscene, lewd and lascivious", are in conflict with the decisions of this court interpreting the Act of Congress.

(2)—The decisions of the courts below are in conflict with the decisions of other circuit courts of appeals, particularly on the question of publications on sex instruction. There is also a variance between the earlier and the later decisions which, in some measure, conform to the change in standards of public opinion and the greater freedom now prevailing in discussions of problems of sex.

(3)—The courts below have decided an important question of Federal law—the application of the words "obscene, lewd and lascivious", and the word "filthy" to publications on sex instruction—which has not been but should be settled by this court.

(4)—The ruling that the jury might be permitted to decide from their own knowledge what would be the effect of the practice advocated by defendant was contrary to the decisions of this court.

(5)—The refusal of the courts below to set aside the conviction because of improper remarks of the prosecuting attorney in his address to the jury, is in conflict with the decisions of this court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this court for its review and determination, a full and complete transcript of the record and all pro-

ceedings in the case of George Frederick Gundelfinger, petitioner, v. United States of America, Respondent, No. 7713; and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

GEORGE FREDERICK GUNDELFINGER,

By .....,
Attorney.

BRIEF.

OPINIONS OF THE COURTS BELOW.

No opinion was filed by the district judge or by the Circuit Court of Appeals. The district judge's interpretation of the Act is contained in his charge (R. 142-151; 153-156).

ARGUMENT.

The indictment is based on Section 211, as amended, of the Criminal Code (18 U. S. C. A., Sec. 334). The relevant language of the statute is as follows:

> "Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulations or disposition thereof, shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *"

As originally enacted by the *Act of June 8, 1872,* Ch. 335, 17 Stat. L. 302, the statute was limited to matter which was "obscene, lewd, or lascivious". This phrase was not altered until the enactment of Section 211 of the Criminal Code, *Act of March 4, 1909,* Ch. 321, 35 Stat. L. 1088, 1129, which added the words "and every filthy," so that the phrase has since read "every obscene, lewd, or lascivious and every filthy book," etc.

In *Swearingen v. United States,* 161 U. S. 446, 450, the Supreme Court held that each of the words "obscene, lewd or lascivious" did not describe a separate or distinct offense, but that these three words were used conjunctively and described but a single offense. In other words, in order to violate the statute as then worded the publication must be obscene, lewd and lascivious.

In *United States v. Limehouse,* 285 U. S. 424, 426, the supreme court held that by the addition of the words "and every filthy" by the amendment of March 4, 1909, "Congress added a new class of unmailable matter,—the filthy".

The result is that the Act of Congress now creates two distinct offenses relating to matter that is (1) obscene, lewd and lascivious, or (2) filthy.

Certain counts of the indictment against the defendant charge that his publication was "obscene, lewd and lascivious"; other counts charge that his publication was "filthy".

I.

THE DECISION OF THE LOWER COURT THAT THE PUBLICATIONS OF PETITIONER WERE "OBSCENE, LEWD AND LASCIVIOUS", IS IN CONFLICT WITH THE DECISIONS OF THIS COURT INTERPRETING THE ACT OF CONGRESS.

In *Swearingen v. United States,* 161, 446, this court held that these three words "have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit" (450-451); and further that these words signify "matter to corrupt the morals of the people"; "that form of immorality which has relation

to sexual impurity"; and "calculated to corrupt and debauch the mind and morals of those into whose hands it might fall" (450-451).

In *Dunlop v. United States,* 165 U. S. 485, 501, this court said that "the true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sensual desires and lascivious thoughts."

The language of the Swearingen case is quoted with approval in *Dysart v. United States,* 272 U. S. 655, 657.

The language in the pamphlet, Exhibit "1", the circular, Exhibit "6", and the letter, Exhibit "7", we submit, was not used to corrupt the morals of the people and does not suggest that form of immorality which has relation to sexual impurity and particularly does not tend to deprave the morals in one way only, namely, by exciting sensual desires and lascivious thoughts.

We submit, therefore, that there was no evidence to support a conviction under Counts 1, 3, 5, 9, 13, 17, 19 or 21 which charged that the publication was "obscene, lewd and lascivious".

They show no purpose to suggest immorality. The one thing, above all, which the defendant hopes to accomplish, is to prevent and lessen immorality.

In the pamphlet the defendant declares "The purpose of my literature is TO PREVENT THE VERY ACT" (Page 742 of Ex. 1, R. 174) * * *

In the pamphlet defendant quotes the following from a letter written by him to the postal inspector at Pittsburgh:

> "My whole life has been and will be devoted to a campaign for the extermination of all that is

obscene, lewd, filthy, indecent and immoral. But I do not believe that such an end can ever be attained through silence and the suppression either of the sexual impulse itself or of the crystal-clear enlightenment in regard to it and both its abuses and its advantages. During my ten years at Yale I never once heard sex referred to in decent diction. And it was because I had to listen constantly to so-called educated men relating their immoral experiences with women in nothing but lewd and filthy words and phrases that I decided to counteract it with a crusade wherein I would outshout them in a language of respectability to reveal that sex could be the thought and conversation of a gentleman and that it actually had a proper place in an educational institution. Such is my crusade known as THE NEW FRATERNITY." (Page 743)

Counsel for the government read into the record certain passages from the pamphlet, circular and letter (R. 96-103; 104-105; 108).

We quote the following passages as explaining what the defendant advocates:

"What I have dealt with in my pamphlets is largely a matter of belief although I have suggested a supplementary physical action to intensify that belief and which, I am certain, with the assistance of the proper thought conducts a maximum amount of the seminal fluid to the brain via the blood for the stimulation of the mind. I have admitted that this physical action as a means closely resembles masturbation but differs radically from such a practice in its end, because of the accompanying frame of mind and in that its primary purpose is not to produce an orgasm or the sensual sensations which precede one. The main object of this 'pumping' is to

charge the brain (as a battery), involving an internal absorption of the semen and not an external dis-charge. It conserves the seminal fluid and utilizes it for mental stimulation, whereas the object of birth control is pleasurable sensation through its dissipation and the actual preclusion of its use for reproduction.

"It should hardly be necessary for me to add that this 'pumping' is to be performed in the privacy of one's study and can, therefore, be regarded as no more indecent than sexual intercourse in the privacy of a boudoir. Nor is it any more immoral than the latter; in fact, because of its very purpose, it is moral." (R. 97.)

"The question of 'pumping' came up for discussion. We contended that it was not the equivalent of masturbation in that it did not involve ejaculation of the seminal fluid." (R. 100-101.)

While belief of the defendant that his publications are not obscene, may not be a defense, *Rosen v. United States,* 161 U. S. 29, 31, the circumstances attending his publication are relevant to show his purpose, *United States v. Dennett,* 39 F. 2d 564, 568).

The defendant's purpose clearly appears from the passages just quoted from the pamphlet, Exhibit "1". The publication has been issued without charge or profit and at his own expense. These facts are most convincing proof of his sincerity and devotion to the cause adopted by him. His writings are in contrast with other books and magazines which for years have been allowed to pass through the mails—in which the cesspools and slaughter houses of modern society are exhumed and portrayed before the reader—not in the interest of social reform or moral betterment, but for the selfish purpose of commercial profit.

II.

THE DECISIONS OF THE COURTS BELOW ARE IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS, PARTICULARLY ON THE QUESTION OF PUBLICATIONS ON SEX INSTRUCTION.

Not only are the decisions in conflict but the later decisions show a different trend away from stricter interpretations in some of the earlier decisions. This trend has been contemporaneous with the change in public opinion as to the wisdom of instructing the younger generation on questions of sex and with the greater freedom now prevailing in discussing sex questions. The later decisions also are more liberal in applying the Act of Congress to recent books of fiction and other publications which deal candidly with sex.

Among the later decisions holding that books on sex instructions do not violate the Act, are:

United States v. Dennett, 39 F. 2d 564 (2nd Cir., 1930);

Davis v. United States, 62 F. 2d 473 (6th Cir., 1933);

Parmelee v. United States, 113 F. 2d 729 (Ct. App., Dist. Col., 1940);

Hanson v. United States, 157 F. 749 (7th Cir., 1907);

Bours v. United States, 229 F. 960, 965 (7th C. C. A., 1915).

Reference is also made to *Dysart v. United States,* 272 U. S. 655.

In contrast with these decisions are such older cases as:

Burton v. United States, 142 U. S. 57 (8th C. C. A., 1906);

United States v. Chesman, 19 F. 497 (C. C. E. D. Mo., 1881);
United States v. Smith, 45 F. 476 (D. C. E. D. Wis., 1891; affirmed in 50 F. 921).

While the publications involved in some of this last group of older decisions were none too meritorious, the opinions reflect a different view from that expressed in the earlier group.

The change in opinion was explained by Circuit Judge Augustus N. Hand in *United States v. Dennett,* 39 F. 2d 564, 568, as follows:

> "The old theory that information about sex matters should be left to chance has greatly changed, and, while there is still a difference of opinion as to just the kind of instruction which ought to be given, it is commonly thought in these days that much was lacking in the old mystery and reticence. This is evident from the current literature on the subject, particularly such pamphlets as 'Sex Education', issued by the Treasury Department United States Public Health Service in 1927."

Recent decisions indicating the present trend of opinion as to fiction and other books in which sex relations are treated, are:

United States v. One Book Entitled Ulysses, 72 F. 705 (2 D. C. C. A., 1934, held not obscene);
Parmelee v. United States, 113 F. 2d 729, 731-732 (Ct. App., Dist. Col., 1940), book entitled "Nudism in Modern Life" held not obscene.

Another question on which the different circuit courts of appeal have differed is whether the violation of the Act shall be decided from isolated passages or by considering the publication as a whole.

In the case at bar the prosecuting attorney read to the jury selected passages from the defendant's publications, and thereby raised this question.

It has been held that the publication cannot be judged by a single passage, but must be considered as a whole in the light of its dominant effect.

United States v. Levine, 83 F. 2d 156, 157, 158 (2nd C. C. A.);
Parmelee v. United States, 113 F. 2d 729, 737 (Ct. App., Dist. Col.);
United States v. One Book Entitled Ulysses, 72 F. 705 (2nd C. C. A.);
Halsey v. New York Society for Suppression of Vice, 234 N. Y., 136 N. E. 219, 220.

A contrary view was held in—
Demolli v. United States, 144 F. 363, 365 (8th C. C. A.);
Griffin v. United States, 248 F. 6, 9 (1st C. C. A.).

III.

THE COURTS BELOW HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW — THE APPLICATION OF THE WORDS "OBSCENE, LEWD AND LASCIVIOUS", AND THE WORD "FILTHY" TO PUBLICATIONS ON SEX INSTRUCTION — WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

This court has not decided any case involving the application of the Act to publications on sex instruction.

In *United States v. Limehouse,* 285 U. S. 424, the publication discussed sexual immorality, and the court had no occasion to interpret the word "filthy".

The word "filthy" has no definite legal meaning as the word "obscene" has at common law. We have found

no interpretation of the word "filthy" in any criminal statute except this Act of Congress. The sense in which the word is used must therefore be obtained from the context.

The statute does not deal with physical filth, but with "every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character".

By a filthy book or picture, we ordinarily mean a book or picture exploiting sex or immorality. To make this interpretation even more sure, the statute adds the words "of an indecent character" (*United States v. Smith,* 11 F. 663, 665). That is, the book or picture must be both (1) filthy and (2) indecent before the statute is violated.

IV.

THE RULING THAT THE JURY MIGHT BE PERMITTED TO DECIDE FROM THEIR OWN KNOWLEDGE WHAT WOULD BE THE EFFECT OF THE PRACTICE ADVOCATED BY DEFENDANT WAS CONTRARY TO THE DECISION OF THIS COURT.

The government offered no evidence to prove that the defendant's views or theory were unsound from a medical or scientific standpoint.

On cross-examination, counsel for the government tried to have the defendant admit that the practice advocated by him was injurious and that no medical authority would say the contrary (R. 117).

Defendant denied this and offered to produce authorities, and cited the books of Dr. Alexis Carrel and Dr. David H. Keller. When the defendant offered to read from one of these authorities, counsel for the government refused to permit him to do so (R. 118-119).

The burden was on the government to prove every fact necessary to show criminality. If the writings of the defendant are to be proved, obscene, etc., because his views are medically unsound, then this unsoundness becomes a necessary part of the government's case, and the burden was on the government to establish this beyond a reasonable doubt.

But in reason, can defendant's views be not obscene or filthy if accepted by contemporary scientific or medical opinion, and be obscene or filthy, if not so accepted? In this country criminality does not depend upon conformity with accepted belief. Orthodoxy is not enjoined by law. Nor is infallibility an essential element in innocence. Freedom of speech is not circumscribed by prevalent opinion.

It was error, we contend, to instruct the jury that they might determine from their own knowledge the effect of the practice.

Courts will not take judicial notice of scientific or physiological facts such as the effect of certain substances or practices upon human health:

Austin v. Tennessee, 179 U. S. 343, 348 (effect of cigarettes);

Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 99 (whether vaccination prevents smallpox);

People v. Price, 257 Ill. 587, 101 N. E. 196, 198 (effect of boric acid);

16 Corpus Juris, 514, Sec. 952, 953.

No more should a jury be permitted to decide such questions from their own limited experience or knowledge.

V.

THE REFUSAL OF THE COURTS BELOW TO SET ASIDE THE CONVICTION BECAUSE OF IMPROPER REMARKS OF THE PROSECUTING ATTORNEY IN HIS ADDRESS TO THE JURY, IS IN CONFLICT WITH THE DECISION OF THIS COURT.

These remarks are embodied in the tenth assignment of error (R. 219). Objection to these remarks was taken by counsel for defendant immediately after counsel for the government concluded his address (R. 135). The objection was specific and stated the substance of the remarks complained of (R. 135-137). A certified transcript of the address of counsel for the government is included in the bill of exceptions (R. 162-172).

The trial judge refused this motion but instructed the jury that the remarks objected to were immaterial and did this before beginning his general charge to the jury (R. 138-141). The remarks objected to were not withdrawn by counsel for the government.

We submit that the remarks were so prejudicial that the effect upon the jury could not be removed by the instruction of the trial judge.

The following passages were very prejudicial:

> "This fellow is a peculiar fellow to me. You notice he has his own counsel—that is, he is his own counsel—he trusts no one except himself. And you know the old saying, 'He who is his own lawyer usually has a fool for a client.' (R. 163)
>
> "* * * Lots of these so-called morons, reformers, walk about like sheep in wolves' clothing. You know about Dr. Jekyll and Mr. Hyde; you know

he walks like a saint when he first starts out. * * * (R. 164)

"I do not understand this fellow, I do not understand enough about psychology to figure out the kind of a mind he has. You know there are maniacs of different varieties. There are kleptomaniacs, who have a desire for stealing; there are pyromaniacs, who want to set fire to things; and dipsomaniacs from drinking. There are a number of different kinds of maniacs. He is 'dippy' on one subject. There is a screw loose up here (indicating). He may be intelligent in every other respect, but he has this cross-wire up here which makes him 'dippy' on that one thing—and that is the sublimate pumping (R. 165).

* * * *

"* * * I could bring a doctor here, but it does not matter what the doctor said, you know boys who are nervous wrecks (walking around like skeletons), with their ears almost dropped down to their shoulders * * * (R. 169)

"* * * I am telling you that the Government of the United States is calling on you, Yale University is calling on you, every other college in the country, and every mother and father who have young men at school are calling on you to keep out of the mails the stuff this fellow here is putting in to corrupt the morals of this nation. We ask you, gentlemen of the jury, to stop him dead in his tracks, that we may have no more of it." (R. 171)

The refusal of defendant's motion to continue the case was in conflict with the rule of law announced by Mr. Justice Stone in *New York Central R. R. Co. v. Johnson,* 279 U. S. 310, 318 that "the public interest requires that the court of its own motion, as is its power

and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

Other applications of the rule are:

Volkmor v. United States, 13 F. 2d 594, 595;
Read v. United States, 42 F. 2d 636, 645.

Respectfully submitted,

H. F. STAMBAUGH,
Attorney for Petitioner.

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Statute:

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409689—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 194

GEORGE FREDERICK GUNDELFINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court. The judgment of the District Court (R. 140–141) was affirmed by the Circuit Court of Appeals per curiam without opinion (R. 150).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 21, 1941 (R. 150). The petition for a writ of certiorari was filed June 20, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether certain printed and typed matter deposited by petitioner in the United States mails was "obscene, lewd, or lascivious" or "filthy" within the meaning of Section 211 of the Criminal Code.

2. Whether the trial court erred to petitioner's prejudice in instructing the jury.

3. Whether the trial court erred in refusing to grant petitioner's motion to withdraw a juror because of allegedly improper remarks by Government counsel in closing to the jury.

STATUTE INVOLVED

Section 211 of the Criminal Code, as amended (18 U. S. C. sec. 334), so far as pertinent, provides:

> Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter * * *. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more

than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

Petitioner was convicted, by verdict of a jury, upon 17 counts (R. 139–140) of an indictment in 22 counts (R. 2–7) returned in the Western District of Pennsylvania charging, in the odd numbered counts, that certain matter mailed by petitioner was obscene, lewd and lascivious and, in the even numbered counts, that the same matter was filthy, in violation of Section 211 of the Criminal Code.

Three documents are involved. Exhibit 1 (R. 39–130), the subject of counts 1 to 6, inclusive, 9, 10, 13, and 14, is a booklet which was mailed to three members of the faculty of Yale University and to two Government attorneys in this city (R. 151–152). Exhibit 6 (R. 131–134), covered by count 16 (charging that it was "filthy"), is a pamphlet in which was reprinted two articles from the Yale News and contains comments on these articles by the petitioner. This pamphlet was mailed to a Government attorney in this city (R. 151–152). Exhibit 7 (R. 135–137), the subject of counts 17 to 22, inclusive, is a letter mailed to three members of the Yale football squad (R. 152).

On November 1, 1940, the trial court, after overruling motions in arrest of judgment and for a new trial (R. 137–138), ordered that sentence be suspended and petitioner placed on probation for five

years (R. 1). In January 1941 a bench warrant was issued, a hearing was held, probation was revoked (R. 2), and petitioner was, by a general sentence, committed for a year and a day to the custody of the Attorney General for imprisonment in a penitentiary or in an institution for the treatment of mental cases (R. 141).[1] Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgment of conviction was affirmed *per curiam* without opinion (R. 150).

The evidence shows that petitioner was a graduate of and at one time an instructor at Yale University (R. 9, 15, 16). As a result of his association with and observation of students, he professes to have become imbued with an honest desire to "lessen immorality" among them (R. 10). He became convinced that the practice of manual manipulation of the male genital organ, stopping short of ejaculation and therefore not amounting to masturbation (R. 12, 13, 47), would reduce immorality, debauchery, and prostitution by serving as a clean and healthy substitute for them (R. 10–11, 50, 59), and would, moreover, benefit the individual's phys-

[1] We are not clear that petitioner's mental condition was or is sound, although the defense of insanity has not been advanced. But the alternative commitment, permitting detention in an institution for the treatment of mental cases, seems to remove much of the difficulty. We have been informed by the Bureau of Prisons of this Department that, under the circumstances, the petitioner will not be committed to an institution of the penitentiary type until after examination by competent psychiatrists.

ical and mental welfare (R. 10, 12, 47, 50, 54, 69, 135–137).

Petitioner has for 20 years (R. 47–48) printed and distributed, apparently entirely through the United States mails (R. 48), and at a considerable financial loss (R. 11, 48), thousands of pamphlets, booklets, and other of his writings called "New Fraternity Publications" (R. 130), especially to students and professors of Yale University (R. 10, 47).

Petitioner admits authorship and mailing of each of the exhibits (R. 26; Pet. 2–3), but denies that the matter mailed was "obscene, lewd, or lascivious" or "filthy" within the meaning of Section 211 (Pet. 9–16).

ARGUMENT

I

We do not believe that it can be doubted that the matter mailed by petitioner is "obscene, lewd, or lascivious" or "filthy" as those words of Section 211 have been judicially construed. *Swearingen* v. *United States,* 161 U. S. 446, 451; *Dunlop* v. *United States,* 165 U. S. 486, 500–501; *United States* v. *Limehouse,* 285 U. S. 424, 426; *Tyomies Pub. Co.* v. *United States,* 211 Fed. 385, 390 (C. C. A. 6).[2] See, e. g., as to Exhibit 1 R. 46–50, 53, 54, 58–62, 68–71;

[2] If Exhibits 1 and 7 come within either category or if Exhibit 6 is "filthy," that is sufficient since a general sentence was imposed which may be sustained by any count of the indictment under which petitioner was convicted.

as to Exhibit 6 R. 133; as to Exhibit 7 R. 136–137. There is no claim that this matter possessed literary or scientific value which might justify passages otherwise offensive (*United States* v. *One Book Entitled Ulysses,* 72 F. (2d) 705 (C. C. A. 2)), and obviously it cannot be said to rise to the dignity of sex instruction. *United States* v. *Dennett,* 39 F. (2d) 564 (C. C. A. 2). That petitioner, may, in his own opinion, have written "in the interest of social reform or moral betterment" is immaterial. *Rosen* v. *United States,* 161 U. S. 29, pp. 41–42; *Knowles* v. *United States,* 170 Fed. 409 (C. C. A. 8); *United States* v. *Slenker,* 32 Fed. 691 (W. D. Va.); *United States* v. *Harman,* 45 Fed. 414 (D. Kan.), reversed on other grounds, 50 Fed. 921 (C. C. D. Kan.).

The trial judge, we submit, could not have held, as a matter of law, that the writings involved were not within the purview of Section 211 and he appropriately left the determination of the question to the jury under comprehensive instructions (R. 144). See *Rosen* v. *United States, supra,* at p. 43; *United States* v. *Levine,* 83 F. (2d) 156, 157 (C. C. A. 2).

II

Petitioner contends (Pet. 16) that the trial court erred in permitting the jury to decide from its own knowledge whether the practices advocated by the petitioner would have an injurious effect upon one who practiced it. (See R. 29, cf. R. 12–13, 36.)

As both the trial court and the prosecuting attorney observed, the effect of following the practice advocated by petitioner was a wholly immaterial issue (R. 29), but petitioner injected this issue by requesting a charge that there was no evidence on the subject. The court's gratuitous observation that, in the absence of evidence, the jury could decide the question was clearly not prejudicial, since the court had previously instructed in its principal charge as to the essential elements of the offenses (R. 22–28). Moreover, petitioner did not object to the court's statement or the observations of the prosecuting attorney and must be presumed to have acquiesced therein.

III

Petitioner characterizes as improper and prejudicial certain statements in the closing argument of the prosecuting attorney (Pet. 18–19). While some of the remarks were intemperate or unnecessary, there is no basis for any claim of prejudicial error since the court promptly and in detail appropriately instructed the jury as to those which were called to its attention (R. 18–21). In view of the conclusive character of the evidence, counsel's argument cannot be said to have deprived petitioner of a fair trial. *Berger* v. *United States,* 295 U. S. 78, 84–89; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239; *United States* v. *Buckner,* 108 F. (2d) 921, 928 (C. C. A. 2), certiorari denied, 309 U. S. 669.

CONCLUSION

There is involved no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941